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NO. 90-235

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

WASTE CONTRACTORS, INC., PETITIONER

v.

LAUDERDALE COUNTY COMMISSION
AND THE STATE OF ALABAMA,
RESPONDENTS

BRIEF OF LAUDERDALE COUNTY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Did Waste Contractors, Inc. obtain a property interest protected by the Due Process Clause in an approval granted by the Lauderdale County, Alabama Commission to operate a landfill where the approval was obtained by fraud?

2. Did Waste Contractors, Inc. obtain a property interest protected by the Due Process Clause in an approval granted by the Lauderdale County, Alabama Commission to operate a landfill where the approval was rescinded 69 days later before Waste Contractors, Inc. expended substantial amounts in reliance on the approval?

3. Did Waste Contractors, Inc. obtain a property interest protected by the Due Process Clause in an approval granted by the Lauderdale County, Alabama Commission but revoked prior to any application being filed with the Alabama Department of Environmental Management where Alabama law requires an operating permit by the Alabama Department of Environmental Management to establish a landfill?

4. Are the issues between these parties moot where:

   A. Alabama law required approval by local government and an operating permit from the Alabama Department of Environmental Management prior to establishing a landfill;

   B. The Lauderdale County, Alabama Commission granted approval but rescinded it prior to an application for operating permit being filed with the Alabama Department of Environmental Management;

   C. Prior to obtaining an operating permit the Alabama Legislature enacted legislation known as the Solid Waste Management Plan, (May 16, 1989) providing that no landfill permits may be issued in Alabama during a 24 month period during which local governments, regional commissions and the state will develop proper standards and procedures approved by the Alabama Department of Environmental Management for permitting such landfills?

5. Should petition for certiorari be granted where petitioner's real complaint is not that due process was not extended to it but was extended to others?

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BRIEF OF LAUDERDALE COUNTY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

STATEMENT OF FACTS

Waste Contractors, Inc. has never held a permit to establish a landfill at the Greenbrier site in Lauderdale County, Alabama.

In 1969 the Alabama Legislature enacted the Solid Wastes Disposal Act

Ala. Code 22-27-1 et seq. (1975). Section 22-27-5(b) gives local governments the power to assign territories for the collection and disposal of waste, to approve or disapprove disposal sites, to establish and collect annual licensing fees and set rate schedules if a service fee is charged. The Solid Wastes Disposal Act further established the Alabama Department of Environmental Management (ADEM) as the regulator of solid waste disposal. Ala. Code §22-27-7 (1975). In exercise of this regulatory power, ADEM has enacted over fifty sections of regulations devoted to solid waste landfills. A sampling of the titles of these various sections -- Siting Standards, Site Geology and

Hydrology, Ground Water Resources, Drainage, Liners--evidences the comprehensive nature of ADEM's regulations. A landfill cannot be operated until ADEM regulations are complied with and an operating permit is issued by it.

On April 14, 1987 Waste Contractors, Inc. ("WCI") applied to the Lauderdale County Commission for approval to operate a landfill at the Greenbrier site. At the time the application for approval was made and granted, no presentation was made to the Commission nor was a hearing held. On May 11, 1987, the area of the landfill was increased, also without any such presentation, hearing or discussion.

While no presentation or hearing was had at the time the approval was given, prior discussion had taken place between Larry McCullough, General Manager of WCI, and Judge William B. Duncan, Judge of Probate and Chairman of the Lauderdale County Commission. In these discussions Mr. McCullough had represented to Judge Duncan and the Commission that the Greenbrier site would handle no more than 350 tons of solid waste per day. WCI answered the Commission's Interrogatory 7 propounded in the trial court as follows:

"7. State the maximum amount of solid waste which you will dispose of in the landfill in question on a daily basis, weekly and monthly."

Waste Contractor, Inc.'s sworn answer was:

"7. As disclosed to the Lauderdale County Commission and to the Citizens of Lauderdale County as early as August, 1985, Waste Contractors anticipates at this time that the landfill in question will accept about 350 tons of waste daily."

(R-185 & 186, Interrogatory 7, R-55, and answer R-69)

These representations were false and rather than a small local landfill to handle local needs, WCI was planning a huge regional landfill which would handle over five times the amount of solid waste represented to Judge Duncan and the Commission from its inception. Correspondence from WCI to the Alabama Department of Environmental Management dated March 14, 1988, contained the following statements:

1. "Greenbrier has been designed and planned as a regional landfill."

2. "Thus, a regional sanitary landfill is the only concept that can make sense for private investment."

3. "Given our planned initial gate schedule of a 10-hour day and three operators of three pieces of landfill equipment (i.e., D-7 dozer, 826 compactor and 677 scrapper) the initial loading thresholds would be in the area of 1,800+ tons per day. This threshold is not a site capacity by any means and would be increased if demand is there by merely adjusting the variables referred to above."

(R-181 & 132) (Emphasis added)

This evidence of WCI's fraud uncovered by discovery in the lawsuit filed against the Commission was not controverted by any evidence before the Trial Court which granted summary judgment to the Commission.

On June 20, 1987, sixty-nine days after approval of the landfill was

granted, the Lauderdale County Commission rescinded the approval. At the time the approval was rescinded WCI had not applied for an operating permit from the Department of Environmental Management and has never been granted such a permit though it was applied for in July, 1987.

Between the dates approval was granted and rescinded (April 14, 1987 to June 27, 1987), WCI spent very little money in reliance on the approval. WCI's answers to interrogatories show items amounting to $11,000 or less plus $30,000 paid for options on real estate. (R-68) Actual purchase of real estate occurred after the approval was rescinded. (R-100-104) Presumably WCI paid reasonable cash market value for the real estate and still owns it.

In 1989 the Alabama Legislature enacted the Solid Waste Management Plan. Ala. Code 22-27-40 et seq. (1975). The Act became effective on May 16, 1989. At that time WCI did not have and still has no operating permit to establish the landfill. The Act provides for the development of standards and procedures for local governments, regional commissions and the state for the licensing of landfills. Ala. Code §22-27-49 (1975) provides that no permits may be issued for the operation of landfills for a period of 24 months while the standards and procedures are being developed. WCI has no such permit and has not physically developed or operated a landfill at this site. At the end of the 24 month period the site will or

will not be licensed depending upon whether WCI can comply with the standards or procedures. It cannot obtain an operating permit in the meantime.

REASONS WHY THE PETITION SHOULD BE DENIED

I. WASTE CONTRACTORS, INC. OBTAINED NO PROTECTED PROPERTY INTEREST IN THE APPROVAL BECAUSE THE APPROVAL WAS OBTAINED BY FRAUD UNCHALLENGED IN THE TRIAL COURT.

The undisputed evidence before the Trial Court on motion for summary judgment was that WCI had represented to the Lauderdale County Commission that the landfill in question would be a small landfill for the purpose of meeting local needs. These

representations were made to obtain the approval. WCI's sworn answers to interrogatories and its own correspondence to the Alabama Department of Environmental Management proved that the representation was false and that WCI intended a large, regional landfill initially handling five times the amount of garbage represented to the Commission. WCI did not acquire a vested right to the approval since it was obtained by fraud. Godson v. Town of Surfside, 150 Fla. 614, 8 So.2d 497 (1942). In Re Pierce's Appeal, 347 P.2d 790 (Okla. 1959).

WCI chose not to challenge the truth of the evidence of fraud in the Trial Court where it had every opportunity to do so. Instead it chose

to attack the statute granting the right to approve or disapprove tc local governments on the ground that the Alabama Legislature had not included proper standards and procedures in the statute. In effect it said: "So what if there is evidence of fraud from our correspondence and sworn answers to interrogatories, we didn't need to get approval from the Commission in the first place."

In Codd v. Velger, 429 U.S. 624 (1977) this Court held that the plaintiff's rights under the Due Process Clause were not violated where a non-tenured city employee was not given a hearing prior to dismissal due to the stigmatizing effect of certain material placed in his personnel file where the employee did not challenge

the substantial truth of the material in question. The opinion of the Court stated:

> "Our discussion here rests upon no overly technical application of the rules of pleading. Even conceding the respondent's termination occurred solely because of the report of an apparent suicide attempt, a proposition which is certainly not crystal clear on this record, respondent has at no stage of this litigation affirmatively stated that the "attempt" did take place as reported. The furthest he has gone is a suggestion by his counsel that "it might have all been a mistake, it could also have been horseplay." This is not enough to raise an issue about the substantial accuracy of the report. Respondent has therefore made out no claim under the Fourteenth Amendment that he was harmed by the denial of the hearing, even were we to accept in its entirety the determination by the Court of Appeals that the creation and disclosure of the file report otherwise amounted to stigmatization within the meaning of Board of Regents v. Roth, supra."

429 U.S. 624, 627 & 628 (1977)

WCI failed to challenge the truth of the allegations and proof that it obtained the Commission's approval by fraud when it had an opportunity to do so in the Trial Court. It did not acquire a vested protected property interest in the approval obtained by such fraud.

II. WASTE CONTRACTORS, INC. ACQUIRED NO VESTED, PROTECTED PROPERTY INTEREST IN THE APPROVAL BECAUSE IT DID NOT MAKE SUBSTANTIAL EXPENDITURES IN RELIANCE UPON THE APPROVAL BEFORE IT WAS RESCINDED.

The issuance of a permit creates no vested right unless the permittee, acting in good faith has made substantial expenditures in reliance upon the permit before it was

rescinded. Four Seasons' Apartments v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985)., Keiger v. Winston-Salem Board of Adjustment, 190 S.E.2d 175 (N.C. 1972). WCI's answers to interrogatories showed an expenditure of less than $11,000 plus $30,000 paid for options on real estate after the approval was given and before it was revoked.

Expenditures made before the approval was granted and after it was rescinded were not made in reliance on the approval. Substantial expenditures were not made and WCI had no vested, protected property interest in the approval.

III. WASTE CONTRACTORS, INC. DID NOT ACQUIRE A PROTECTED PROPERTY INTEREST IN THE COMMISSION'S APPROVAL BECAUSE ALABAMA LAW REQUIRES AN OPERATING PERMIT FROM THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT BEFORE ESTABLISHING A LANDFILL.

WCI makes the following observations on pages 10 and 11 of its petition:

> "The starting point in determining whether an individual has a constitutionally protected liberty or property interest is whether the asserted interest is grounded in an independent source such as the state law. But not every interest grounded in state law is protected by the Due Process Clause. See e.g., Paul v. Davis, 424 U.S. 693, 710-712 (1976). Rather, this Court has identified several criteria that must be applied to ascertain whether an interest with some basis in state law rises to the level of a property interest protected by the Due Process Clause.

> First, a court must assess the concreteness of the asserted interest; in other words, is the entitlement firmly defined by state law? See Leis, 439 U.S. at 441-443, Roth, 408 U.S. at 577-578. The more closely an interest resembles a right of ownership or a right defined by contract, the more likely compliance with due process will be required before the government may take it away. If, on the other hand, state law holds that the nature and scope of the asserted interest turns on the exercise of un-guided discretion, the interest is not likely to be sufficiently concrete to give rise to a constitutionally protected entitlement. "The hallmark of property *** is an individual entitlement grounded in state law, which cannot be removed except for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982)

The Alabama law gives the local government the power to approve or disapprove landfill sites. Ala. Code 22-27-5(b) (1975) However, it is the Alabama Department of Environmental Management ("ADEM") which is the real regulator of solid waste disposal. An

operating permit for a landfill cannot be acquired until ADEM's environmental standards and procedures have been complied with and then ADEM issues the permit. The Commission granted approval and sixty-nine days later rescinded it. At that time WCI had not filed an application for an ADEM permit and had not complied with ADEM's standards and procedures. Looking to state law WCI did not have a protected property interest and in fact had not applied for such an interest when the Commission rescinded its approval.

IV. THE ISSUES BETWEEN THESE PARTIES ARE NOW MOOT BECAUSE WASTE CONTRACTORS, INC. HAS NEVER OBTAINED AN OPERATING PERMIT FROM THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT AND NO PERMIT CAN BE ACQUIRED UNTIL STANDARDS AND PROCEDURES ARE IN PLACE UNDER THE SOLID WASTE MANAGEMENT PLAN ENACTED WHILE THIS LITIGATION WAS PENDING - THE LANDFILL WILL OR WILL NOT BE PERMITTED DEPENDING ON WHETHER IT MEETS THE NEW STANDARDS.

While this case was pending in the appellate courts of Alabama the Alabama Legislature enacted the Solid Waste Management Plan. Ala. Code §22-27-40 et seq. (1975). At the time this legislation became effective (May 16, 1989) WCI had no operating permit from the Alabama Department of Environmental Management ("ADEM"). In fact its approval from Lauderdale County had been rescinded prior to any application

for such a permit. The Act contains the following legislative findings:

§22-27-40.

The legislature finds that:

(a) The state, its subdivisions and the nation face an emerging crisis in solid waste management;

(b) Proper waste management is an increasingly complex issue involving the need for reducing the volumes of waste requiring disposal, properly managing wastes to reduce the likelihood of both short-term and long-term threat to human health and the environment, and assuring that adequate, environmentally secure, waste management and disposal facilities will be available at reasonable costs to accommodate wastes generated in the state;

(c) Provision for necessary systems, facilities, technology and services for solid waste management and resource recovery is a matter of important public interest and concern, and action taken

in this regard will be for a public purpose and will benefit the public welfare;

(d) Solid waste management problems are potentially statewide in scope and necessitate state and local action through the development and implementation of comprehensive long-range plans for solid waste management which recognize the conditions in the state now and those which can be expected in the foreseeable future, and which serve to assure that the state as a whole and local jurisdictions in particular will meet their long-term solid waste management needs;

(e) Proper planning for solid waste management must include the evaluation of facility sites based on a broad group of factors including, but not limited to, environmental conditions, local needs for waste management, social and economic impacts on the host community, the availability and impact on public services, and the consistency of a proposed facility with any final solid waste management plan;

(f) Proper solid waste management planning also should provide leadership in the application of new and improved methods and processes to reduce the amount of solid waste that must be disposed of and to promote environmentally acceptable and economically sound solid waste management;

(g) The failure or inability to economically recover and recycle materials and energy resources from solid waste results in the unnecessary waste and depletion of natural resources;

(h) The landfill disposal of solid waste, even under the most ideal conditions, has the potential to create long-term pollution and environmental degradation;

(i) Current conditions and pending federal regulatory requirements likely will increase the costs of landfill disposal, prompt the closure of many landfills in the state and likely change the methods of solid waste management in the state away from the present system of management by individual cities and counties and toward the development of larger

> facilities which must be capable of meeting the needs of several jurisdictions. Given this evolving situation, the legislature concludes that a concerted solid waste management planning program is essential to address the imminent and future needs of the state.

Ala. Code §22-27-47 & 48 of the Act provide for the development and implementation of local, regional and state plans in regard to the issuing of any permits for landfills. The Act sets out in detail the criteria to be used by local governments in developing such standards and procedures and provides that those standards and procedures must be approved by the Alabama Department of Environmental Management. Ala. Code §22-27-49 provides that no permits may be issued

for the operation of landfills for a period of 24 months after which the standards and procedures for licensing will be in place. The Act applies to the site in question because WCI has never acquired a license or permit to develop or operate this landfill. If WCI complies with the standards and procedures developed under the Solid Waste Management Plan the landfill will receive an operating permit. All issues between these parties which arose prior to the enactment of this legislation are now moot. The issue in regard to whether WCI will acquire an operating permit is whether it can comply with standards and procedures developed under the Solid Waste Management Plan -- not whether it can obtain notice and hearing in regard to

Commission approval under the old Solid Wastes Disposal Act. (Ala. Code §22-27-1, et seq.) (1975).

V. THE ISSUES BETWEEN THESE PARTIES ARE MOOT AND WASTE CONTRACTORS, INC.'S REAL PURPOSE IS TO CREATE PRECEDENT DENYING OTHERS A RIGHT TO NOTICE AND HEARING.

This case is now of no consequence in regard to whether or not WCI acquires a permit to operate the Greenbrier site. WCI's real complaint is that the Alabama Supreme Court in its decision indicated that other persons who were affected by the approval were entitled to notice and hearing. Apparently these are persons who WCI does not want to have such right and seeks to establish that precedent in this case.

WCI argues that the Alabama Supreme Court has engaged in a pattern of unconstitutional behavior, the last incident being this case where the Alabama Court indicated in its opinion that affected citizenry have a right to notice and hearing when the government considers permitting a large landfill. How has the Alabama Court violated the letter or spirit of the Constitution by declaring that someone who may have invested his or her life savings in a home has a right to notice and hearing before the government licenses a huge garbage dump next door? Why does WCI complain that these people merely be given the right to notice and to be heard before this happens? What standing does WCI have to complain about the right to notice and hearing being extended to others?

WCI makes the assertion in its brief that every court to consider the question of whether such affected citizens have a right to notice and hearing has decided this question differently from the decision of the Alabama Supreme Court. It then cites Save Our Dunes v. Alabama Department of Environmental Management, 834 F.2d 984, 988-989 (11th Cir. 1987). While the Court held in that case that aesthetic, environmental or recreational concerns alone do not confer "aggrieved party status" under Alabama law giving a person a right to challenge and appeal decisions of the Alabama Department of Environmental Management it did state that persons owning land in the vicinity affected by the decision would

have such right. The Court quoted Cox v. Poer, 45 Ala. App. 295, 229 So.2d 797 (1969) as follows:

> "This, in addition to showing the proximity of one property to the other, requires proof of the adverse affect the changed status of the rezoned property has, or could have, on the use, enjoyment and value of the property of the protestant."

On page 11 of the Petitioner's petition, WCI, cites three Alabama cases as examples of the Alabama Court's violation of the Constitution by extending the right to notice and to be heard to property owners whose property may be affected by a land use decision. The first case is City of Tuscaloosa v. Bryan, 505 So.2d 330 (Ala. 1987). In this case adjoining

property owners brought a declaratory judgment action and suit for injunction against city officials alleging their violation of the City's own zoning ordinances. The trial court found for the plaintiffs and its opinion stated as follows:

> "26. The City of Tuscaloosa deprived the plaintiffs of due process of law under Article 1, §§1,6 and 22 of the Constitution of Alabama. See e.g., Lynnwood Property Owners [Ass'n] supra. (In light of the Court's ruling, it is unnecessary to decide whether the plaintiff's federal constitutional claims are viable.)" (Emphasis supplied.)

The Alabama Supreme Court affirmed the decision with no mention of federal due process rights and did not in any way deal with the Due Process Clause of the U. S. Constitution.

The second case cited by WCI is Lynnwood Property Owners Ass'n v. Lands Described, 359 So.2d 357 (Ala. 1978). This case is also a declaratory judgment action by a property owners association filed against city officials alleging a violation of the city's own zoning laws and regulations. The Alabama Supreme Court decided the case in favor of the property owner's association making the following observation:

> "To allow the Commission to ignore its own bylaws and regulations with impunity would foster impermissible arbitrariness of our city governments. The mandates of procedural due process of law prevent such actions. Therefore, we hold that Lynnwood was deprived of procedural due process when the Commission reviewed and reconsidered Dr. Ray's zoning

> amendment application which previously had been disapproved at the preceding monthly meeting. Fairness requires that the Commission follow its own rules. The public, or at least those whose interests are affected by a zoning amendment, has the right to rely upon the Commission's following its own ordinances. McArthur, supra."

The third case, Masters v. Pruce, 290 Ala. 56, 274 So.2d 33 (1973) was a suit brought by residential property owners seeking to enjoin County officials and to declare zoning laws unconstitutional. The Alabama Supreme Court held these laws to violate due process because they allowed the adoption of zoning ordinances without notice to anyone and in particular without notice to affected property owners whose property was being zoned.

These cases cited by WCI hardly show a pattern of unconstitutional behavior by the Alabama Supreme Court.

CONCLUSION

The petition for certiorari should be denied because Waste Contractors has no protected property interest in the approval of the Commission since:

1. It did not challenge the evidence before the Trial Court on summary judgment that the approval was void because it had been obtained by WCI's fraud;

2. WCI had not expended substantial amounts in reliance on the approval before it was rescinded;

3. The approval was rescinded prior to any application for an operating permit from the

> Alabama Department of Environmental Management and WCI has never acquired such a permit without which it cannot develop or operate a landfill on the site in question.

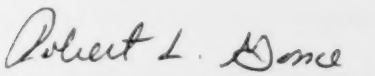
In addition, the issues between these parties are moot. WCI must now comply with procedures and standards of Alabama's Solid Waste Management Plan in order to develop and operate the landfill. It is now of no consequence whether WCI obtained approval or not from the Commission under the Solid Wastes Disposal Act. If it complies with the standards and procedures of the Solid Wastes Management Plan the site will be permitted; if not, it will not be permitted.

Waste Contractors' only real purpose here is to set precedent

overturning the Alabama Court's opinion that persons other than Waste Contractors have a right to notice and hearing before landfill permits are issued. The Alabama Court described these other persons as "affected citizenry." Waste Contractors has no standing to complain that in Alabama these persons are given the right by the Alabama Supreme Court to at least notice and a right to be heard before decisions are made which may have disastrous consequences for the value and enjoyment of their property - their homes. We live in an open society where freedom of speech and press are revered. How have Waste Contractors' constitutional rights been diminished by the Alabama Court declaring that

these affected citizens have a right to some notice and a right to be heard before such decisions are made?

Respectfully submitted,



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